STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
LEGAL SERVICES DIVISION
HEARINGS UNIT

IN THE MATTER OF UNFAIR LABOR CHARGE NO. 40-93:

MONTANA EDUCATION ASSOCIATION, MEA, Complainant,	)	
vs.	)	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER
LAUREL SCHOOL DISTRICT NOS. 17 AND 7-70, Defendant.	)	

* * * * * * * * * *

I. INTRODUCTION

On February 26, 1993 Complainant, Montana Education Association, MEA filed an unfair labor practice charge alleging Laurel School District Numbers 7 and 7-70, Laurel, Montana was violating Section 39-31-305 and 39-31-401 (2) and (5), MCA, by bargaining to impasse over the Complainant organizational name. On March 9, 1993, Defendant denied any violation as alleged and requested the charge be dismissed. An Investigation Report and Determination of March 25, 1993 found sufficient factual and legal issues raised by the charge and the matter was referred to hearing. On December 10, 1993 the Complainant filed a Motion for Summary Judgment or Administrative Equivalent. Following

receipt of briefs, by order of March 31, 1994 the Motion for Summary Judgment or Administrative Equivalent was denied.

The hearing was held on July 8, 1994. Parties present, duly sworn and offering testimony included John Berg, Arlyn Plowman, Rick D'Hooge, Norma Cleveland, David Sexton, John Stratton, Pat Harrison, and Trudy Downer. Complainant was represented by Counsel Kelly Addy and the Defendant by Counsel Larry Martin.

Documents admitted into the record included: Complainant's Exhibits C-A through C-D, 1 through 16, 18 through 30, and Defendant's D-A, Exhibits 1 through 9, 11, 12, 15, and 16. Defendant's Exhibits 1, 2, 2A and 3 were admitted over objection for what they are worth and Complainant's Exhibits C, D, 19 through 25 were also admitted over objection for what they are worth. Proposed Findings of Fact, Conclusions of Law and Order, Briefs, and Reply Briefs were submitted by the parties. Final post-hearing submission was received November 15, 1994.

II. ISSUES

1. Was impasse reached?

2. Did the Defendant refuse to bargain in good faith?

III. FINDINGS OF FACT

1. In early 1992 negotiations began between the Defendant and the certified staffs' bargaining representative, Laurel

Educational Association, "LEA". LEA had never been certified as the representative of the Defendant teaching certified staff but had been recognized by the Defendant as the certified staff bargaining representative. Also in early 1992, negotiations continued, having commenced in the fall of 1990, between the Defendant and the classified staff bargaining representative, the Laurel Classified Employees Association, "LCEA". From October 1990, the Defendant understood LCEA was the representative of the classified employees. Collective bargaining agreements between the parties for the 1992-93 school year identified the contract parties as the Defendant and LEA, MEA/NEA and LCEA, MEA/NEA. Exhibit C-A and C-B.

2. In November 1991, both LCEA and LEA, individually by membership vote almost with no opposition, voted to change the unit names and combine the two units into one unit identified as Laurel Unified Education Association, "LUEA".

3. In February 1992, a new constitution was installed for LUEA. John Stratton, a certified teacher and LEA president, became LUEA president and Norma Sisk, a classified employee and LCEA president became LUEA vice president. The Defendant accurately related in their Proposed Findings of Fact the following information relating to the LUEA constitution.

... The constitution provides that membership in the LUEA is open not only to the certified staff but also to the classified staff. Both certified and classified staff voted for the officers of the LUEA. Officers of the combined organization included both certified and classified employees. Trudy Downer (chief spokesperson for the classified staff) - hearing transcript page 12 - was elected as negotiator for the certified staff but the classified staff was entitled to and did vote on who would be negotiating the certified contact. The president of LUEA, by the LUEA constitution, represents the LUEA with respect to matters not only for the certified staff but also the classified staff. That was also true of the vice president. The vice president was also chairperson of the negotiation committee which establishes policy for both certified and classified negations. The vice president is also chairperson of the grievance committee, and the grievance committee establishes policy and makes decision with respect to grievances for both classified and certified personnel. Building representatives are jointly elected by both certified and classified staff in each building and their numbers based on the total number of both classified and certified employees in every building. Article VIII of the constitution provides for one single negotiations committee with membership from both classified and certified staffs. This committee sets guidelines for a single negotiating team which is comprised of both classified and certified staff members. Tr 34. The negotiating team consists of three members of the certified staff and three members of the classified staff plus the president, and the duty of the negotiating team is to represent the LUEA as a whole in negotiations with the District.

26. The organizational document of the LUEA, its constitution, reflects that indeed two bargaining unions had merged into one with membership open to both and with representatives of both former unions jointly setting policy and representing both classified and certified employees. (Defendant's Proposed Findings of Fact, and Conclusions of Law, page 10-11 lines 16 to 25, lines 1 to 24)

4. During the on going course of negotiations after the two units had combined to form LUEA, negotiators requested in bargaining that LEA and LCEA now be referred to as LUEA. The Defendant did not agree to refer to either LEA or LCEA as LUEA and LUEA did not abandon its desire to receive a new name designation but the parties did agreed to continue bargaining other subjects. The Defendant continued to inquire regarding the "name change" and what was actually involved regarding unit composition and affect. The Defendant in an April 23, 1992 letter from the Montana School Board Association (MSBA) Defendant witness Arlyn Plowman - Labor Relations Specialist, (Exhibit D-5) requested as follows:

> "Your memorandum of April 5, 1992 is appreciated. However it does not resolve all the concerns the Laurel School District has relative to the LEA's proposal to change all references to the Laurel Education Association in the Collective Bargaining Agreement to the Laurel Unified Education Association. First: The MEA Today article discussed during several bargaining sessions referenced the new Laurel "Wall-to-Wall Unit". In private sector labor relations jargon "Wall-to-Wall Unit" means a bargaining unit including all of the employer's non-exempt employees. The Board is and remains convinced that the Laurel School District Classified and Certified employees must remain separate bargaining units. There is no community of interest between certified and the classified staff.
>
> Second: Changing the District's name in the collective bargaining agreement had no impact on the parties bargaining relationship. The name change

proposed by the Association could have a serious and significant impact on that relationship.

Third: The school district will resist any effort to combine the certified and classified bargaining unit into a "Wall-to-Wall Unit". We are not convinced that this is not the intent behind the Associations' proposal.

Fourth: To date the Association has failed to offer sufficient and convincing assurances that the "name change" is only that and not an attempt to change the bargain unit.

The Complainant refused to provide detailed information as requested on the basis that the name change was just a name change and no additional information was needed. In a May 2, 1992 letter LEA president pointed out that his position was that the units had properly voted to unify on May 15, 1992. LUEA officers would be installed, LEA would cease to exist and how LEA chose to name itself is not the Defendant's business and further attempts to interfere with unit internal affairs is a ULP. (Exhibit C-12)

In a May 6, 1992 letter (Exhibit D-7) the Montana School Board Association (MSBA) Defendant witness Arlyn Plowman - Labor Relations Specialist, addressed the LEA president as follows:

Dear Mr. Stratton:

As I stated in my April 23, 1992 response to your memorandum of April 5, 1992, the Laurel School District 7 and 7-70 Board of Trustees is opposed to any "wall-to-wall" bargaining unit which would include both classified and certified employees. The Trustees believe that there is insufficient community of

interests between the classified and certified employees to have them included in the same bargaining unit. The Trustees will resist any effort to combine certified and classified employees into a single bargaining unit. As has been stated across the bargaining table on several occasions and in my April 23, 1992 memorandum, the School District's concern regarding the Association's proposal to change the recognized bargaining representative is based upon a concern such a change could mean regarding the bargaining unit.

The School District's bargaining committee has repeatedly requested explanations and assurances from the Association that the "name change" is only that and not an attempt to combine or expand the bargaining units. To date, the Association has either failed or refused to offer sufficient and convincing assurances that the "name change" proposal is not an attempt to change the bargaining unit. The Association's position could be clearly stated by responding directly to the Trustee's concern: What present or future effect does or will the "name change" have upon the bargaining units and their relationship to the School District?

Section IB of the current collective bargaining agreement requires the Board of Trustees to recognize the Laurel Education Association as the exclusive representative of certain teachers for the "duration of the agreement". The Board will do so.

However, before the board can recognize some other labor organization as the exclusive representative, several questions should be answered. See NLRB v. Financial Institution Employees, 121 LRRM 2741, 475 US 192; May Department Stores, 289 NLRB 88, 128 LRRM 1299; Chas S. Winner Inc., 289 NLRB 13, 130 LRRM 1348; and Western Chemical Transport, Inc., 288 NLRB 27, 127 LRRM 1313.

1) Will the current Laurel Education Association's autonomy continue or will it disappear to be replaced by the Laurel Unified Education Association's control?

2) Will the current leaders of the Laurel Education Association continue to have a major role in the direction of the labor organization or will they be replaced by other members of the Laurel Unified Education Association?

3) Will the rights of the Laurel Education Association members be substantially diminished as a result of the formation of the Laurel Unified Education Association?

4) What changes can be expected from past Laurel Education Association practices and procedures from the Laurel Unified Education Association in the areas of:

a. contract negotiations;

b. administration; and

c. grievance processing?

Your quick response will be appreciated.

Sincerely,

Arlyn L. Plowman

Labor Relations Specialist

5. Bargaining between the parties continued. The Defendant advised the Complainant at an April 1, 1992 meeting that they would not bargain a name change proposal because it is a permissive subject. The Defendant also notified the LEA Complainant unit negotiating team of the Board of Personnel Appeals' procedure for addressing a name change. At hearing, Mr. Plowman, stated he had informed the Complainant as follows;

> Well by this time, I, I, I believe that we were convinced, at least I was convinced, that, that this is not an issue of a name change. This was an issue of whether there was a new labor organization which was a legitimate successor to a previous organization. We took the position at the bargaining table, once again, that it was a permissive subject of bargaining that the Board of Personnel Appeals was the appropriate place to resolve this issue. It was not a bargaining issue. It was an issue to be resolved at

> the Board of Personnel Appeals and by the time we get to the table here for the next contract, this matter had been, these charges had been filed so we're, we're telling them that its, it's in the mill. It's, it's before administrative agency, permissive subject. We'd rather not, in fact we refused to negotiate over the issue. This represents a proposal that we received from the association proposing that we agree to whatever the Board of Personnel Appeals decides on this issue and, and I believe we rejected that. ... Yes. The Board of Personnel Appeals has a procedure in place and as long as I've been knowledgeable about the Board of Personnel Appeals going back then at least eight or nine years, where a labor organization could petition to have its certification amended or changed. And those are known generically as affiliation petitions. (Hearing transcript pp. 138-240)

6. In the charge filed February 26, 1993, the Complainant stated, in part:

> The name by which the exclusive representative chooses to call itself is not a mandatory subject of bargaining nor is it a permissive subject of bargaining for the school districts. To demand that the union use a name preferred by the employer is a violation of the duty to bargain in good faith....

7. The agreement of the parties relating to the name change was that:

> In order to continue the process tonight and bargain in good faith, we agree that tonight's meeting will not infer [sic] nor imply any specific recognition on the part of the District nor that the Association has in any way given up its right to determine its name. (Claimant's Exhibit C-2)

8. Negotiations ultimately led to the use of mediation, a strike and final settlement of two contracts - an initial

contract for the classified staff and a successor contract for the certified staff. Two separate bargaining teams negotiated the contracts. The Complainant did not at any time request or suggest any change in the definition of the units which comprise the certified or classified staff as they had been identified in earlier contracts or negotiations. The Complainant argues in post hearing brief that only the name of the units not the composition or the contractual definition of the bargaining units had changed. The Complainant filed this Unfair Labor Practice Charge alleging refusal to bargain in good faith by bargaining to impasse over the name change which is, according to the Complainant, neither a mandatory nor a permissive subject of bargaining.

9. The Defendant pointed out that no impasse occurred. The parties regularly exchanged proposals for about two years, resolved issues as well as identified and executed contracts. The Defendant continued to point out that the name change is a permissive subject of bargaining but also discussed and inquired regarding the matter. The Defendant agreed to a stipulation under which the parties agreed to negotiations without resolution of the name change issue. The parties did not end negotiations because of the name change issue. They continued to meet, exchange proposals and resolve disagreements.

10. The Complainant did not ask to change the recognition clause of the contract for either the certified LEA or the classified LCEA staff units. In December 1991 a joint LEA/LCEA task force drew up a new constitution which was adopted in February 1992. (Exhibit D-A) The constitution provides for certain officers and requires that both certified and classified staff be represented in the officers elected. The constitution in Section 2. NEGOTIATING TEAM provides as follows;

a. Membership
   The Negotiating Team shall consist of three (3) members from the certified staff and three (3) members from the classified staff, plus the president. Negotiators shall be elected by the members of the LUEA for three (3) year term.
b. Duties
   1. Be responsible for making the membership aware of the Master Agreement provision regarding the reopener clause.
   2. Delegate duties to the Negotiations Committee for research and study.
   3. Tabulate results of the negotiations survey.
   4. Develop negotiations proposals in accordance with the guidelines set by the Negotiations Committee.
   5. Represent the Association in negotiations with the District.
   6. Keep the Negotiations Committee informed during negations.
   7. Publish the Table Talk for all members.
   8. Submit reports and recommendations to the membership for consideration at a regular or special meeting called by the President.

The Complainant indicated the following in its Brief in Support of Complainant's Proposed Findings of Fact, Conclusions of Law and Order, in part,

> The LUEA fielded two bargaining teams, one to negotiate a successor contract with the Defendant school district for certified employees, and one to negotiate a contract for classified employees. There was no intention to change the definition of either bargaining unit or to negotiate one consolidated master agreement covering both classified and certified employees.(Brief p.2)

The negotiation committee is made up of one representative per classified job classification and one member per 15 certified members. (Defendant's Exhibit A, p.7)

11. In Defendant's Proposed Findings of Fact; Conclusions of Law; and Order, counsel requests attorney fees and costs incurred in defending this charge.

IV. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this charge under Section 39-31-404, MCA and under Implementation Rules of Section 24.26.601 and 24.26.680-685 ARM.

2. Impasse did not occur. The Board has adopted a five part test to determine when impasse exists. In the Board of

Personnel Appeals Index of Decisions and Orders, vol. II, (1986-1992), "impasse" is identified as follows:

> "In Montana five (5) factors have been utilized to determine whether impasse exists. They were originally laid down by the NLRB and the NLRB v. Taft Broadcasting, 64 LRRM 1387 and adopted by the BOPA in ULP 20-78... ULP 7-89.
>
> Impasse has been defined as a situation where the negotiators could reasonably conclude "that there is no realistic prospect that continuation of discussion, at that time, would have been fruitful", NLRB v. Independent Association of Steel Fabractors, 582 F.2d 135, (1978). Whether there is impasse is a matter of judgment." ULP 7-89.

The elements considered by the Board in a determination of whether impasse exists are as follows:

1. The bargaining history;
2. The bargaining faith of the parties in negotiations;
3. The length of negotiations "frequency, numerous, exhausting . exploring all grounds for settlement"
4. The importance of the issue or issues as to which there is disagreement (mandatory or permissive subject of bargaining), and
5. The contemporary understanding of the parties as to the state of negotiations. (Defendant's Post Hearing Brief page 27)

The parties in this case had a long history of bargaining which eventually led to two settled contracts, one for LEA and one for LCEA. The fact that proposals were exchanged which ultimately led to contracts shows a bargaining history as well as demonstrating the bargaining faith of the parties. Good

faith is demonstrated where both parties agreed to set aside the name designation issue and continue negotiations. The parties had been negotiating since 1990 and ultimately agreed on collective bargaining agreements, albeit without the name change issue resolved. The parties considered the name changing issue significant, as evidenced by their negotiations as well as this Unfair Labor Charge and charge responses. This, however, was only one issue and did not preclude resolution of any other issue which would have prevented ultimate contract execution. The parties contemporaneously agreed to set aside the name change in order to continue negotiations. Not only did negotiations continue but the fruit of the negotiations were two contracts. Impasse did not occur.

3. The requirement of good faith bargaining is outlined in Volume 1, Patrick Hardin, Charles J. Morris, Developing Labor Law, page 608-10 (1989) as follows:

> The Board and the Courts recognized at an early date that simply compelling the parties to meet was insufficient to promote purposes of the act.[1] Early attempts by employers to satisfy the bargaining obligation by merely going through the motions without actually seeking to adjust differences were condemned.[2] The concept of "good faith" was brought into the law of collective bargaining as a solution to the problem of bargaining without substance.[3] In 1947 Congress

[1]NLRB, 1936 Annual Report 85.
[2]NLRB v. Montgomery Ward & Co., 133 F.2d 676, 12 LRRM 508 (CA 9, 1943); Benson Produce Co, 71 NLRB 888, 19 LRRN 1060 (1946).
[3]Cox, The Duty to Bargain in Good Faith, 71 HARV. L . Rev. 1401, 1413 (1958).

explicitly incorporated the "good faith" requirement in to Section 8(d).

A. Totality of Conduct Assessed: *General Electric* and the Proper Roles of the Parties.

The duty to bargain in good faith is an "obligation... to participate actively in the deliberations so as to indicate a present *intention* to find a basis for agreement...[4] This implies both "an open mind and a sincere desire to reach an agreement" [5] The presence or absence of intent "must be discerned from the record". [6] Except in case where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright refusal to bargain,[7] relevant facts of a case must be studied to determine whether the employer or the union is bargaining in good or bad faith. The "totality of conduct" is the standard by which the "quality" of negotiations is tested.[8] Thus even though some specific actions viewed alone, might not support a charge of bad faith bargaining, the parties overall course of conduct in negotiations may reveal a violation of the Act.[9]

Because the Board considers the entire course of conduct in bargaining, isolated misconduct will not be viewed as a failure to bargain in good faith. Thus, an employer's withdrawal of tentative agreements, standing alone, does not constitute bad faith contravention of the bargaining obligation.[10] In Roman Iron Works,[11]
for example, the employer violated section 8 (a)(5) by its unilateral wage increase during negotiations. The employer also engaged in hard bargaining including a reduction of the wage offer during bargaining, denial of the union's request for employee addresses, insistence on a right to subcontract, and a demand for

[4]NLRB v. Montgomery Ward & Co., supra.
[5](NLRB v. The Truitt Mfg. Co., 351 US 149, 38 LRRM 2042 (1956).
[6]General Elec. Co., 150 NLRB 192, 194, 57 LRRM 1491 (1964)
[7]Intent will not even be an issue if the outward conduct amounts to a refusal to bargain. See NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962)
[8]B.F. Diamond Constr. Co., 163 NLRB 161, 64 LRRM 1333 (1967).
[9]See NLRB v. Cable Vision, 660 F.2d 1, 108 LRRM 2357 (CA 1, 1981).
[10]Williams, 279 NLRB 82, 121 LRRM 1313 (1986).
[11]275 NLRB 449, 119 LRRM 1144 (1985)

> significant cost reductions. However, the Board found the employer meet frequently with the union, made complete contract proposals, and made several significant concessions. Under all these circumstances, the Board found that the employer did not engage in bad-faith bargaining.[12]

The record presented in this case will not support a conclusion that the Defendant refused to bargain with the Complainant. This is especially true given the fact that contracts resulted from negotiations. Defendant did not refuse to bargain in good faith. They displayed an open mind, separated out the name change issue by stipulation and reached an agreement. The "totality of conduct" especially resulting in executed agreements, does not show or even approach the threshold of refusing to bargain in good faith.

4. Name change is a permissive subject of bargaining. In NLRB v. Borg-Warner Corp., Wooster Div., 356 US 342, 42 LRRM 2034, remanded, 260 F2d 785, 43 LRRM 2116 (CA 6, 1958) the Supreme Court adopted the Board's analysis of the distinction between mandatory and permissive subjects of bargaining. The Court reviewed the National Labor Relations Act Sections 8(a)(5) and 8(d) stated, in part;

> Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in

[12]Roman Iron Works, supra note 164.

> good faith with respect to wages, hours, and other terms and conditions of employment....The duty is limited to those subjects, and within that area neither party is legally obliged to yield....As to other matters, however, each party is free to bargain or not to bargain, and to agree or not agree. (356 US at 349)

The name change does not involve wages, hours, and other terms and conditions of employment. Therefore it is a permissive subject of bargaining. No legal authority was offered by the Complainant which identifies a third subject of bargaining which is not mandatory or permissive. In the Brief in Support of Complainant's Proposed Findings of Fact, Conclusions of Law and Order, the Complainant identified the "name change" as "...not even a permissible subject of bargaining." In the charge the Complainant identified the "name change" as "not a mandatory subject of bargaining nor is it a permissive subject of bargaining for the school districts." Research[13] did identify a third subject "illegal" but the "name change" certainly does not fall into that group.

5. The School District did not unlawfully interfere with the union's right to self organization or internal affairs. They reasonably inquired regarding an issue the Complainant brought to the table. The School District did not violate Section 39-31-

[13]see Second Edition, Fifth Supplement, Patrick Hardin, Charles J. Morris, Volume Developing Labor Law, 1982-1988, pp. 297-298.

401 (2) MCA. They did not interfere with, restrain or coerce employees in their exercise of the rights guaranteed in Section 39-31-201, MCA. The School District also did not violate Section 39-31-401 (5). They did bargain in good faith. The Defendant displayed an open mind and a sincere desire to reach agreement. The Defendant met the obligation to bargain as imposed by law. Standing alone, especially given the ending contract agreements reached, the refusal to negotiate or accept the "name change" which is a permissive subject of bargaining does not support a bad faith bargaining charge. As concluded above impasse was not reached. The Defendant did not commit an Unfair Labor Practice as alleged.

6. The Board of Personnel Appeals in several cases addressed the awarding of attorney fees. In Index of Decisions and Orders Montana Board of Personnel Appeals, (1974-1986) the following is provided:

74.352: Types of Orders - Punitive Damages - Attorney's Fees

> "[T]his board has no authority to award attorney fees at the administrative level. In Their vs. The Commission of Labor and Industry, the Montana Supreme Court spoke to this specific issue." ULP #24-77
>
> "The Union shall not be reimbursed for legal or other expenses incurred as a result of bringing these charges." ULP #3-79

> "The Montana Supreme Court has long adhered to the rule that attorney's fees may not be awarded to the successful party unless there is a contractual agreement or unless there is a specific statutory authorization... [U]nder these cases an award could not be made in the absence of specific statutory authorization. Moreover, even if this Board had the equity power of a District Court, the claims here are not of the type which would bring this case within Foy vs. Anderson, ...an equitable exception to the general rule." ULP #11-79
>
> "Mr. O'Connell has not referenced or argued the question of legal cost in his brief... [T]he remedies provided the Board of Personnel Appeals do not include awarding legal costs." ULP #19-79

In accordance with the above reference, attorney fees are not found appropriate in this case.

7. The Board rules at Section 24.26.560 ARM provide the appropriate process to be used to reflect a change in the name of an exclusive bargaining representative. This process should be used by the unions.

V. ORDER

Based on the forgoing analysis Unfair Labor Practice Charge 40-93 is hereby DISMISSED.

Entered and dated this _____ day of February, 1995.

Joseph V. Maronick
Hearing Officer

NOTICE: You are entitled to review of this Order pursuant to Section 39_31_406(6) MCA. Review may be obtained by filing a notice of appeal to the Board of Personnel Appeals postmarked within 20 days after the day the decision of the hearing officer is mailed, (_____). The notice of appeal shall consist of a written appeal of the decision of the hearing officer, must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of Appeal shall be mailed to:

Administrator, Employment Relations Division
Department of Labor and Industry
P.O. Box 1728
Helena, MT 59624

* * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this _____ day of February, 1995.